



Federal Communications Commission  
Washington, D.C. 20554

July 21, 2011

**DA 11-1219**  
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Re: KTKA-TV, Topeka, KS, ID No. 49397  
File No. BALCDT-20110208ADB.

Dear Counsel:

This letter is in reference to the above-captioned application to assign the license of digital television station KTKA-TV, Topeka, Kansas, from Free State Communications, LLC (Free State) to PBC Broadcasting of Topeka License, LLC (PBC). KTKA-TV is assigned to the Topeka Designated Market Area (DMA).

The American Cable Association (ACA) filed a petition to deny the application<sup>1</sup> and, following the close of the pleading cycle, a "supplementary response." ACA contends that, upon grant of the application, there is a significant likelihood that PBC will coordinate negotiation of its retransmission consent agreements with the licensee of other network-affiliated stations in the market, in contravention of the public interest. For the reasons stated below, we deny the petition and grant the application.

*Background.* In its petition, ACA states that 10 of its members operate cable systems in the Topeka DMA (Topeka Operators) and carry ABC affiliate KTKA-TV pursuant to retransmission consent

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<sup>1</sup> PBC filed an opposition, and ACA filed a reply.

agreements that expire on December 31, 2011. These members also carry the signals of other network-affiliated stations pursuant to co-terminus retransmission consent agreements, including NBC affiliate KSNT(TV), Topeka, Kansas, and FOX affiliate KTMJ-CA, Topeka, Kansas, which are licensed to subsidiaries of New Vision Television, LLC (New Vision).

ACA notes that PBC and New Vision will be parties to certain cooperative agreements concerning KTKA-TV, specifically an agreement for the sale of commercial time and a shared services agreement. It further states that the companies have similar arrangements in other markets where both have stations – Youngstown, Ohio, and Savannah, Georgia – and have also coordinated retransmission consent negotiations there.<sup>2</sup> ACA contends that, should PBC and New Vision replicate joint negotiations, the Topeka Operators would face significant injury, because their bargaining power to resist unreasonable hikes in retransmission consent fees would be substantially diminished by the potential loss of multiple network affiliates.<sup>3</sup> Accordingly, ACA asserts that, at a minimum, the Commission must condition any grant of the application to prohibit such coordination.

PBC responds that, by ACA’s own admission, the sole purpose of the petition is to raise issues of broadly applicable policy and that, as a result, the Retransmission Consent Proceeding is the proper forum for resolving them. PBC further maintains that it is long-standing Commission policy not to anticipate a decision in a pending rulemaking in order to provide relief to a petitioner in an adjudicatory proceeding. In its reply, and again in its supplementary response, ACA asserts that it seeks only to address the undeniably transaction-specific harms that flow from the likelihood of joint retransmission consent negotiations by PBC and New Vision in the Topeka DMA, harms which are exacerbated by the fact that the stations involved are affiliated with the top four networks.

*Discussion.* The Commission applies a two-step analysis to a petition to deny under the public interest standard. First, it must determine whether the petition contains specific allegations of fact sufficient to show that granting the application would be *prima facie* inconsistent with the public interest.<sup>4</sup> This first step “is much like that performed by a trial judge considering a motion for directed verdict: if all the supporting facts alleged in the [petition] were true, could a reasonable factfinder conclude that the ultimate fact in dispute had been established.”<sup>5</sup> If the petition meets this first step, the Commission then

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<sup>2</sup> ACA alleges that, through these in-market cooperative agreements, PBC has “ceded operation” of its stations to New Vision. Its allegations, however, are unsubstantiated, and we will not consider them here. To the extent that ACA challenges the propriety of in-market cooperative agreements, *per se*, such challenge is more appropriately raised in the context of the Commission’s pending review of its media ownership rules. See *In the Matter of the 2010 Quadrennial Review – Review of the Commission’s Media Ownership Rule and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Inquiry, 25 FCC Rcd 6086 (2010).

<sup>3</sup> ACA cites to a report it commissioned by Professor William P. Rogerson, *Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effect on Retransmission Consent Fees*. It initially filed this report in support of its petition for rulemaking concerning the retransmission consent process, which resulted in the current, ongoing proceeding to consider possible amendments to the relevant Commission rules. See *Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket 10-71, FCC 11-31 (rel. March 3, 2011) (Retransmission Consent Proceeding).

<sup>4</sup> 47 U.S.C. § 309(d)(1); *Astroline Communications Co., Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (“*Astroline*”).

<sup>5</sup> *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987) (“*Gencom*”).

must determine whether “on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice,” the petitioner has raised a substantial and material question of fact as to whether the application would serve the public interest.<sup>6</sup>

The gravamen of ACA’s petition is that the joint negotiation of retransmission consent agreements by broadcast television licensees in the same market harms cable operators by reducing their bargaining power and that the Commission should act to prohibit it. That is one of the issues squarely under consideration in the Retransmission Consent Proceeding. Indeed, despite ACA’s protest that it is concerned solely with the likelihood of market- and transaction-specific harms, the evidence it marshals in support of its position consists of reports and comments filed therein. We will not address here the substance of the Retransmission Consent Proceeding, and we decline to reach a decision that would effectively pre-judge the outcome of a pending rulemaking in favor of one of the parties that petitioned to commence it.<sup>7</sup> Furthermore, aside from the issue of joint negotiation of retransmission consent agreements, ACA fails to demonstrate that the proposed assignment and related cooperative agreements violate our rules and precedent.

In light of the above discussion, we find that the applicants are fully qualified and conclude that the grant of the assignment application would serve the public interest.

ACCORDINGLY, IT IS ORDERED That the petition to deny filed by the American Cable Association is DENIED. IT IS FURTHER ORDERED That the application for the assignment of license of KTKA-TV, Topeka, Kansas, from Free State Communications, LLC, to PBC Broadcasting of Topeka License, LLC, (File No. BALCDT-20110208ADB) IS GRANTED.

Sincerely,

Barbara A. Kreisman  
Chief, Video Division  
Media Bureau

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<sup>6</sup> *Astroline*, 857 F.2d at 1561; 47 U.S.C. § 309(e).

<sup>7</sup> “Permit-but-disclose” *ex parte* rules already govern the Retransmission Consent Proceeding. 47 C.F.R. 1.1206(a)(1). We see no reason to extend the same *ex parte* status, as requested by ACA, to this adjudicatory proceeding.